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Helen J. Kim

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WHICH ULP IS IT?: AN EXAMINATION OF RETALIATION UNDER SECTIONS 10(A)(1) AND 10(A)(2) OF THE ILLINOIS PUBLIC LABOR RELATIONS ACT

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Helen J. Kim is General Counsel for the Illinois Labor Relations Board. She earned a J.D. from the University of Minnesota Law School and a B.S. in Mathematics from the University of Illinois at Urbana-Champaign. The views expressed in this article are the author's own and not of the State of Illinois or the Illinois Labor Relations Board. Nothing in this article should be construed as an advisory opinion or official statement from the Illinois Labor Relations Board or its agents.

I. INTRODUCTION

The Illinois Public Relations Act (IPLRA or Act)[1] protects public sector employees from retaliation by their employers for engaging in certain types of activity.[2] Section 10(a) of the IPLRA, in relevant part, states:

> (a) It shall be an unfair labor practice for an employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in this Act or to dominate or interfere with the formation, existence or administration of any labor organization or contribute financial or other support to it; provided, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (2) to discriminate in regard to hire or tenure of employment or any term or condition of employment in order to encourage or discourage membership in or other support for any labor organization. Nothing in this Act or any other law precludes a public employer from making an agreement with a labor organization to require as a condition of employment the payment of a fair share under paragraph (e) of Section 6; . . .

When a public sector employee suffers an adverse employment action after exercising rights guaranteed by the Act, is it a violation of Section 10(a)(1), Section 10(a)(2), or both? A reading of Sections 10(a)(1) and 10(a)(2) suggests that the two sections apply to different and distinct circumstances. The distinction between the two sections is significant, for Section 10(a)(2) requires a

determination of an employer's specific intent for the complained-of conduct, whereas such determination is not required under the broader language of Section 10(a)(1). Without recognizing this distinction, the proper analysis cannot be applied to determine whether the employer committed an unfair labor practice.

Section 10(a)(1) generally applies in cases where the employer's conduct "interfere[s] with, restrain[s], or coerces" public employees in their exercise of rights guaranteed by the Act.[3] Proof of a public employer's motive for its conduct in such cases is generally not required.[4] For example, where an employer threatens retaliation for engaging in concerted activity, the Illinois Labor Relations Board[5] (Board) has evaluated the alleged violative conduct objectively without consideration of the employer's motive due to the nature of the conduct, i.e., the threat.[6] On the other hand, because Section 10(a)(2) expressly prohibits discriminatory adverse employment actions taken for a specified motive—"to encourage or discourage membership in or other support for any labor organization," i.e., antiunion animus, evaluation of an employer's motive for the alleged conduct is needed to demonstrate a violation.[7]

But for Section 10(a)(1) cases involving allegations that an employee suffered an adverse employment action because the employee engaged in concerted activity, the Board has evaluated the employer's motive for the employment action because unlike a threat where motive is readily apparent, the employer's reasons for discipline or the denial of a promotion may not be as obvious.[8] To determine motive, the Board has applied the burden-shifting analytical framework for Section 10(a)(2) cases set forth in *City of Burbank v. ISLRB*,[9] but without consideration of the specific "anti-union animus" motivation.[10] This article examines the development of the analyses the Board and courts have applied to retaliation cases in determining whether public employers have engaged in unfair labor practices under Sections 10(a)(1) or 10(a)(2) of the Act.[11]

II. RETALIATION: THE EARLY YEARS

Shortly after passage of the Act, the State and Local Boards considered under Section 10(a)(1) and Section 10(a)(2), several cases involving public employers' actions in response to employee organizing activity. These early State and Local Board decisions illustrate the development of the analysis currently used in retaliation cases under Sections 10(a)(1) and 10(a)(2) of the Act.

One of the earliest State Board cases, *Village of Glendale Heights*,[12] involved the Village's actions toward James Gagnier, an employee who had actively participated in efforts to organize the Village's public services employees and

eventually became steward for the union selected to represent the employees.[13] Shortly after Gagnier became steward, the Village began enforcing its personnel and safety rules strictly. It charged Gagnier with several rule violations which led it to discipline him and to his eventual discharge.[14]

The hearing officer noted that where an employee exercises rights under the Act but also violates the employer's rules, allegations that the employer's actions are retaliatory involve both legitimate and illicit employer motives.[15] Recognizing the challenge posed by such "mixed motive" cases, the hearing officer examined the approaches taken by the Wisconsin Supreme Court and at one time taken by by the National Labor Relations Board (NLRB). The hearing officer recommended that the State Board adopt a similar approach under which conduct would be deemed unlawful if an employer is motivated at least in part by an employee's protected activity.[16] Following this approach, the hearing officer concluded the Village was partly motivated by Gagnier's participation in the union's organizing efforts and therefore violated Section 10(a)(2), and derivatively Section 10(a)(1) of the Act.[17] The hearing officer rejected the NLRB's approach in *Wright Line, Inc.*,[18] which allows an employer an affirmative defense if it demonstrates it would have taken the adverse action regardless of the employee's protected activity; instead, the hearing officer evaluated the Village's alleged business reasons—violation of its rules—to determine the appropriate remedy for the violation.[19] The hearing officer found the Village failed to demonstrate it would have disciplined and discharged Gagnier regardless of his support for unionization and concluded reinstatement with back pay appropriately remedied the Village's unlawful conduct.[20]

The State Board agreed with the hearing officer's conclusion that the Village's actions against Gagnier violated Section 10(a)(2) of the Act but declined to adopt the recommended "mixed motive" approach because it observed that the record demonstrated the Village had no motive for its actions other than Gagnier's union activities.[21] The State Board explained although it declined to follow the hearing officer's approach in this particular case, it understood that under the recommended approach, the *Wright Line* analysis would be used to determine the appropriate remedy rather than whether the conduct in question constituted a violation.[22]

A few weeks later, the State Board again had occasion to consider applying the "mixed motive" approach recommended by the hearing officer in *Village of Glendale Heights* in a case involving another public employer's alleged retaliatory conduct. In *State of Illinois Department of Central Management Services. (Morgan)* (*CMS/Morgan*),[23] Gerald Morgan, a correctional officer working at the State of Illinois's Lincoln Correctional Center, was contacted by an internal investigator so that he could be interviewed in connection with an investigation

into an inmate escape.[24] Morgan refused to answer the investigator's questions without the presence of a union representative and was later discharged for refusing to cooperate in the investigation.[25] The State Board recognized Morgan's request for union representation during the investigatory interview, i.e., rights under the *Weingarten doctrine,*[26] as a right inherent in Section 6 of the Act and further determined the State discharged Morgan because he exercised those rights.[27] Agreeing with the hearing officer's conclusion that the State's conduct violated Section 10(a)(1), the State Board noted: "If [an employer] disciplines [an] employee for *refusing* to continue in the absence of representation the employer is, in effect, retaliating against the employee *because* he has engaged in protected concerted activity, and such conduct is clearly violative of Section 10(a)(1)."[28]

Notably, the State Board, recognizing the State's right to demand accurate reporting in the tightly controlled and secured environment of a correctional center, re-considered the "mixed motive" approach it declined to take under the circumstances in *Village of Glendale Heights.*[29] To balance an employer's interest in enforcing rules of conduct with an employee's rights under the Act, the State Board established a framework to determine whether an employer has engaged in an unfair labor practice in cases where the allegations involve employee misconduct, but the employer's actions were motivated, at least in part, by the employee's participation in protected activity:[30]

> When a Charging Party demonstrates that an adverse employment action was motivated, at least in part, by his having engaged in protected activities, we will find a violation of the Act, which will raise a presumption that the standard make whole remedy is appropriate. To rebut this presumption, the burden will be upon the employer to demonstrate that the same action would have been taken for legitimate reasons even in the absence of the protected activities. If the employer fully meets this burden in a discharge situation, it will not be required to grant the Charging Party reinstatement and back pay. Rather, the only remedy will be the posting of a notice.[31]

Several State Board decisions followed this analysis in cases where both legitimate and illicit motives were present.[32] In one such case, *County of Peoria*,[33] the State Board determined a party alleging an employer's retaliatory conduct amounts to a violation of the Act must establish four elements: "(1) union or protected concerted activity, (2) employer knowledge of such activity, (3) animus

toward such activity, and (4) an adverse employment action under suspect circumstances."[34]

Meanwhile the Local Board, in *Chicago Housing Authority (Gale),*[35] looked to NLRB precedent but took a slightly different approach towards retaliation cases, focusing on the language of Section 10(a)(1). Noting the similarity between Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (NLRA)[36] and Sections 10(a)(1) and 10(a)(2) of the Act, the Local Board observed that the comparable sections of the Act should be interpreted in the same fashion as the NLRA sections "such that proof of anti-union animus is generally necessary to make out a Section 10(a)(2) violation."[37] The inquiry, however, did not end there for the Local Board. In the absence of anti-union animus, the Board focused on an objective standard, examining whether the employer's actions had the *effect of* coercing, restraining, or interfering with employees' rights under the Act rather than examining whether the employer was improperly motivated to take the complained-of action.[38]

In *Chicago Housing Authority (Gale),* Mikel Gale, a fireman with the Chicago Housing Authority, alleged he was harassed, disciplined, denied a promotion, and finally discharged, because he filed grievances over alleged mistreatment by his supervisors.[39] The hearing officer, citing *American Freightways Co.*[40] and *NLRB v. Haberman Construction Co.,*[41] concluded that retaliation against an employee for filing grievances was "inherently destructive" of employee rights because it "unambiguously penalizes and deters that protected activity."[42] The Local Board upheld the hearing officer's conclusion that by harassing and disciplining Gale for filing grievances, the CHA's actions effectively restrained employees from exercising their rights under the Act in violation of Section 10(a)(1), but found that the same conduct did not violate Section 10(a)(2).[43] Explaining the "inherently destructive" analysis applies only as a substitute for motive in the context of Section 10(a)(2), the Local Board found no evidence of antiunion motive where the complained of conduct stemmed from personal animosity rather than intent to encourage or discourage membership or other support for a labor organization.[44]

This analysis was applied in *City of Chicago, Chicago Police Department (Kostro).*[45] In that case, James Kostro, a police officer, claimed the City committed an unfair labor practice when it disciplined him for filing a grievance. The City claimed Kostro was disciplined for failing to comply with department rules. The hearing officer found that, although the City was partly motivated by Kostro's grievance filing, regardless of the City's reasons for disciplining Kostro, the City's conduct interfered with Kostro's exercise of his rights under the Act, in this case his filing of a grievance.[46] The Local Board adopted the hearing officer's conclusion that the City of Chicago violated Section 10(a)(1) of the Act.[47]

III. RETALIATION ANALYSIS UNDER SECTION 10(a)(2) ADOPTED IN COURT CASES

As discussed above, the analytical framework set forth in *CMS/Morgan* was followed in subsequent cases involving retaliation until modified by the Illinois Appellate Court's decision in *County of Menard v. ISLRB.*[48] In *County of Menard,* the court reviewed the State Board's decision in *County of Menard (II),*[49] the second of three State Board decisions involving the discharge of a County of Menard employee[50].

The *County of Menard* State Board cases concerned an unfair labor practice charge filed by the American Federation of State, County, and Municipal Employees, Council 31 (AFSCME) alleging the County discharged one of its employees, Donald Witherall, in retaliation for his support of AFSCME's organizing campaign. The State Board in *County of Menard (I),*[51] adopted the hearing officer's findings of fact but reversed his conclusion that the discharge was proper. The hearing officer had determined the discharge was proper because he found no evidence of animus or illegal motivation on the part of the County board members who voted to discharge Witherall.[52] The State Board disagreed and remanded the matter for a determination of whether Witherall's supervisor was illegally motivated by Witherall's unionizing efforts when he recommended Witherall's discharge to County board members.[53]

On remand, the hearing officer determined the supervisor was, at least in part, illegally motivated in recommending Witherall's discharge.[54] Following the framework set forth in *CMS/Morgan,*[55] the hearing officer, after finding the discharge violated the Act, determined reinstatement with backpay to be the appropriate remedy because the County failed to demonstrate that Witherall would have been discharged regardless of his union activities.[56] In *County of Menard (II),* the State Board adopted the hearing officer's recommendations on remand concluding that the County unlawfully discharged Witherall, and finding reinstatement with backpay to be the appropriate remedy.[57]

The County petitioned the Illinois Appellate Court to review the State Board's *County of Menard (II)* decision, urging the court to adopt the NLRB's *Wright Line* analysis.[58] The Fourth District found the County's arguments persuasive. In *County of Menard v. ISLRB,* [59] the court affirmed the denial of the County's attempt to relitigate certain representation issues but reversed the State Board's determination that the discharge was improper and remanded with instructions to apply the *Wright Line* analysis to the facts in the case.[60]

The court questioned the State Board's analysis adopted in *CMS/Morgan*,[61] reasoning that the approach followed a minority view which the court rejected in *Hardin County Educ. Ass'n. v. IELRB*,[62] and created an irrebuttable presumption wherein an employer could never disprove a violation.[63] The court further noted that the *Wright Line* analysis had been applied by the Second District in *Rockford Township Highway Dep't. v. ISLRB*,[64] and by the court in *Hardin County Education Ass'n. v. IELRB*,[65] which found the approach in *Wright Line* appropriately balanced competing interests in discriminatory discharges cases under Section 14(a)(3) of the Illinois Educational Labor Relations Act,[66] a section analogous to Section 10(a)(2) of the Act.[67]

The court held that the party alleging an unfair labor practice under Section 10(a)(2) of the Act must establish a *prima facie* case that the employer was motivated to take action against an employee because the employee engaged in protected activity.[68] Once established, the burden shifts to the employer to show by a preponderance of the evidence that it would have taken action against the employee even absent the employee's participation in protected activity.[69] If the employer meets this burden, there is no violation of the Act.[70] The court concluded by remanding the case to the State Board with instructions to apply the *Wright Line* analysis. On remand, Board applied the *Wright Line* analysis in *County of Menard (III)*,[71] finding the County violated Sections 10(a)(1) and 10(a)(2) of the Act and adopting the *Wright Line* analysis for future cases.[72]

Shortly after the Fourth District's decision, the Illinois Supreme Court in *City of Burbank v. ISLRB*,[73] solidified the adoption of the *Wright Line* burden-shifting analysis for cases involving retaliation against employees who exercised their rights under the Act.[74] Unlike the conduct in the *County of Menard* cases, the retaliatory action against the employee in *City of Burbank* did not involve allegations of employee misconduct. Rather, the State Board in *City of Burbank* was confronted with an employee discharge resulting from the City's reorganization of its Public Works department.[75]

Two days before the State Board certified AFSCME Council 31 as the exclusive representative of employees working in the City of Burbank's Public Works Department, the City of Burbank reorganized the department, eliminating two foreman positions and replacing them with one newly created Deputy Director of Public Works.[76] As a result of this reorganization, Robert Randle, a foreman and AFSCME supporter during AFSCME's organization campaign, was laid off.[77] Norbert Maza, the other foreman who had previously voiced opposition to AFSCME's organization efforts on at least one occasion, was placed into the newly created Deputy Director position.[78]

The State Board observed that the City of Burbank's reorganization was specifically designed to exclude the foreman positions from collective bargaining

in response to its unsuccessful objection to AFSCME's petition to represent a bargaining unit comprising public works employees, including the two foreman positions. [79] The State Board noted that the City actively sought to exclude the two foreman positions as supervisors, was aware of Randle's testimony at the representation hearing that he wished to be included in the unit, and challenged Randle's ballot after the State Board determined the positions were not supervisory and directed an election.[80] The State Board also observed that the City filed a unit clarification petition to exclude the deputy director position but that petition was dismissed.[81] Thus, the State Board concluded, the City engaged in a pattern of conduct intended to circumvent the Act's grant of rights to public employees and engaged in unfair labor practices in violation of Sections 10(a)(1), 10(a)(2) and 10(a)(3) of the Act.[82]

In *City of Burbank v. ISLRB,*[83] the Illinois Appellate Court for the First District affirmed the State Board's decision, rejecting the City of Burbank's appeal that the State Board decision was against the manifest weight of the evidence.[84] The court identified the central issue in the case was whether Randle's termination was motivated by antiunion animus and concluded that circumstantial evidence supported the State Board's decision finding the City's reorganization was a pretext for antiunion animus.[85] The court determined that motive was a question of fact and that circumstantial evidence such as the employer's knowledge of an employee's union activities, the proximity in time between the union activity and the adverse employment action, and the employer's conduct, can be used to establish an unfair labor practice.[86]

The City of Burbank appealed the appellate court's decision to the Illinois Supreme Court. In *City of Burbank v. ISLRB,*[87] the supreme court affirmed the appellate court's decision, setting forth the burden-shifting analysis to be used in retaliation cases under Section 10(a)(2) of the Act.[88] The court held that the employee claiming an unfair labor practice under Section 10(a)(2) must first prove by a preponderance of the evidence that the employer was motivated to take adverse action against the employee because that employee participated in union activities.[89] The court observed that motive is a question of fact that can be demonstrated through direct or circumstantial evidence. [90] Citing federal precedent, the court observed that antiunion motivation can be inferred from evidence of the employer's hostility towards unionization together with the employer's knowledge of the employee's participation in organizing efforts;[91] the proximity in time between the alleged adverse action and the employee's union activities;[92] disparate treatment or targeting of known union supporters for adverse actions;[93] and inconsistencies in the employer's proffered reasons for the adverse action or shifting reasons for its adverse actions.[94]

Once motivation for the adverse action is established, the burden shifts to the employer to prove it took the adverse action for legitimate reasons and that the employer would have taken the action despite the employee's union activities.[95]

In affirming the appellate court's decision, the supreme court noted two points in the appellate court's analysis requiring clarification to avoid confusion in future cases.[96] The supreme court observed the appellate court proceeded to a "dual motive" analysis before determining whether the City of Burbank's proffered reasons for discharging Randle were indeed legitimate, i.e., *bona fide*, even though the "dual motive" analysis necessarily requires proof there was a lawful motive in addition to the alleged unlawful one.[97] The supreme court also viewed the appellate court's determination that evidence of the City of Burbank's knowledge of Randle's union activities or the City's pattern of conduct was sufficient to support a violation, as a departure from federal precedent requiring a showing of the employer's knowledge 0f an employee's union activities in addition to evidence of the employer's hostility towards union organizing.[98]

IV. RETALIATION UNDER SECTION 10(a)(1) OF THE ACT

After the Illinois Supreme Court's decision in *City of Burbank*, both State and Local Boards issued decisions applying the analysis from Section 10(a)(2) of the Act to evaluate allegations of employer retaliatory conduct arising under Section 10(a)(1).[99] In each case, the boards found that the nature of retaliatory conduct required a determination of motive but found that the objective test provided an inadequate means to arrive at that determination. The boards found the analysis used to evaluate conduct under Section 10(a)(2) set forth in *City of Burbank*, which required a showing of motive, provided the appropriate method to determine whether the conduct coerced, restrained or interfered with employee rights under the Act.[100]

In *Chicago Housing Authority (Kirk),*[101] the Local Board dismissed allegations that the Chicago Housing Authority (CHA) retaliated against William Kirk, a janitor in its employ and steward for his union, Service Employees International Union, Local 1, in violation of Section 10(a)(1) of the Act.[102] Kirk claimed the CHA denied his transfer grievance and then denied his bids for promotion because he filed grievances on his own behalf and on behalf of others in his bargaining unit, and because he served as a union steward.[103] The hearing officer concluded CHA's conduct did not violate Section 10(a)(1) of the Act because the CHA had justifiable reasons for denying Kirk's transfer grievance and promotional bids, even though the CHA's actions were against Kirk's interest.[104]

The Local Board adopted the hearing officer's conclusion that the CHA's actions did not violate Section 10(a)(1) but modified the analysis applied.[105] It distinguished the allegations in the case before it from "one involving a threat or question which may be evaluated as to whether it would reasonably have had the effect of coercing, restraining or interfering with the exercise of protected rights."[106] It observed that allegations that employer actions "were committed against [an employee] *because of*, and in retaliation *for*" an employee's exercise of rights guaranteed by the Act, require a determination that the employer's "action was *in fact* illegally motivated."[107] As such, the Local Board found the objective test articulated in prior Local Board cases,[108] which does not consider motive but evaluates whether conduct "had the effect of coercing, restraining or interfering with the exercise of protected rights," inadequately assessed the nature of the retaliatory conduct to determine whether such retaliatory conduct violated Section 10(a)(1) of the Act.[109] Thus, the Local Board found the analysis "must track" the analysis used in evaluating cases arising under Section 10(a)(2) of the Act.[110] Applying this analysis, the Local Board found CHA's actions did not violate Section 10(a)(1) of the Act because the CHA advanced legitimate business reasons for its actions against Kirk, and Kirk failed to demonstrate those reasons were pretextual.[111]

Following the Local Board's reasoning regarding the "objective test," the State Board in *County of Jersey (Lewis and McAdams)*,[112] likewise applied the framework under Section 10(a)(2) to determine whether the adverse employment actions at issue violated Section 10(a)(1) of the Act.[113] In that case, Don Lewis and Michael McAdams, employees of the County of Jersey Highway Department, alleged the County of Jersey unlawfully laid them off and eventually discharged them in retaliation for filing a grievance raising perceived safety concerns.[114] Because there was no evidence that the County of Jersey discriminated against Lewis and McAdams based on their union membership, the State Board found no violation arising under Section 10(a)(2) but concluded the County of Jersey retaliated against them based on their grievance activity in violation of Section 10(a)(1) of the Act.[115]

Like the Local Board found in *Chicago Housing Authority (Kirk)*,[116] the State Board determined the objective test to be inadequate in evaluating retaliatory conduct under Section 10(a)(1) because the nature of retaliatory conduct necessarily required an examination of motive, The State Board thus found a Section 10(a)(2)-type analysis to be applicable.[117] It also found that a Section 10(a)(2)-type analysis was appropriate because "union activity" and "protected concerted activity" are both protected under the Act, and so reprisals based on either activity would be prohibited.[118] The State Board determined that the employees established the elements of a *prima facie* case used in *County of Peoria*,[119] finding three elements—protected concerted activity, the employer's

knowledge of that activity, and an adverse employment action—were undisputed and that the adverse action was taken under suspect circumstances.[120] In so finding, the State Board determined suspect circumstances existed based on evidence of the employer's expression of hostility or animus toward the employees' grievances, which suggested a causal connection between the employees' layoff and discharge and the protected concerted activity.[121] The State Board then found the County of Jersey's reasons for the layoff and discharge were pretexts for its illegal motive and concluded the County of Jersey vi0lated Section 10(a)(1) of the Act. [122]

The application of the Section 10(a)(2) analysis to retaliation cases under Section 10(a)(1) was further settled in *Pace Suburban Bus Division of the Regional Transportation Authority v. ILRB, Local Panel.*[123] In the underlying Board decision, the Local Panel adopted the administrative law judge's (ALJ) findings and conclusions that PACE Northwest Division (Pace) committed unfair labor practices in violation of Section 10(a)(1) of the Act when it discharged one of its employees for participating in protected concerted activity.[124] The employee, Urszula Panikowski, a bus operator employed by Pace, alleged she was discharged in retaliation for her successful grievance of an earlier discharge and resulting reinstatement.[125]

Because the allegations involved retaliation for Panikowski's grievance filing, i.e., concerted activity, the ALJ determined they should be analyzed as retaliation under Section 10(a)(1) of the Act and, following the Board's decisions in *County of Jersey* and *Chicago Housing Authority (Kirk)*, applied the Section 10(a)(2) burden-shifting analysis, substituting "protected concerted activity in the 10(a)(1) analysis for union activity."[126] The ALJ concluded Panikowski met her burden by establishing: (1) she engaged in protected concerted activity by filing and prevailing in her grievance over her prior discharge; (2) the decision-makers in her discharge at issue were aware of her successful grievance and resulting reinstatement; and (3) a causal connection between her protected concerted activity and her current discharge though circumstantial evidence of the employer's shifting reasons for her current discharge.[127] After finding Panikowski established a *prima facie* case, the ALJ shifted the burden to PACE to demonstrate it would have discharged Panikowski in the absence of her successful grievance of her prior discharge and determined Pace failed to satisfy its burden, thus concluding Pace violated Section 10(a)(1) of the Act.[128]

Pace petitioned the Illinois Appellate Court to review the Local Panel's decision, contending, *inter alia*, that the Board erred by sustaining a violation without a demonstration of antiunion animus.[129] The court affirmed the Board's decision, specifically rejecting Pace's argument that proof of antiunion animus is required to establish a violation under Section 10(a)(1).[130] The court found that to establish

retaliation under Section 10(a)(1), an employee must demonstrate "retaliation for engaging in activities protected by the Act, regardless of whether it is considered union activity or the [adverse action] was otherwise motivated by antiunion animus."[131] Recognizing that Section 10(a)(1) in general does not require a demonstration of an improper motive, the court observed that when employees claim their employers took an adverse employment action against them, they necessarily claim their employer acted with an illegal motive.[132] The court further recognized that Section 10(a)(1) broadly protects employees' rights under the Act, whereas Section 10(a)(2) provides narrower protection from adverse employment actions based on union membership and activities.[133]

Agreeing with the Board's contention, the court determined a prima facie case of retaliation under Section 10(a)(1) requires employees to demonstrate: (1) they engaged in protected concerted activity; (2) their employer was aware of the nature of their activity; and (3) the employer took an adverse employment action against them for "discriminatory reasons, i.e., animus toward [their] participation in such activities."[134] The court found Pace's reliance on the Illinois Supreme Court's decision in *City of Burbank* misplaced, noting the language of the supreme court's holding in that case indicated that a showing of either antiunion animus *or* that the employee's protected activity was a substantial or motivating factor would support a finding of an unfair labor practice.[135] The court also found support for this interpretation of the supreme court's holding in the Fifth District's decision in *Sheriff of Jackson County v. ISLRB*,[136] its decision in *Speed District 802 v. Warning*,[137] and in federal precedent.[138] The court reasoned that requiring a showing of antiunion animus in addition to proving the employer was motivated to take an adverse action because the employee participated in activity protected by the Act, places an undue burden on employees.[139]

V. CONCLUSION

The answer to the question "which ULP is it?" or whether the conduct at issue violates Section 10(a)(1) or Section 10(a)(2) appears to depend on the circumstances surrounding the alleged violative conduct and motive. Section 10(a)(2) prohibits a public employer from discriminating in employment actions based on support for a labor organization. As such, many of the cases where the Board has found violations of Section 10(a)(2) involved employee participation in union organizing efforts or other circumstances demonstrating the employer acted against employees with anti-union animus, i.e., to "discourage or encourage" support for a labor organization.

Because Section 10(a)(2) requires a specific motive—to encourage or discourage support for a union—it follows that retaliatory conduct will not constitute a violation of that section in the absence of evidence of anti-union animus. As the

above discussion suggests, the absence of anti-union motivation may defeat a violation under Section 10(a)(2) of the Act, but it does not end the inquiry for retaliatory conduct may still constitute a violation of Section 10(a)(1) which broadly prohibits conduct that "interfere[s] with, restrain[s], or coerces" participation in concerted activity.

When an employer denies an individual employee rights or threatens or prevents the employee from exercising rights guaranteed by the Act, such as filing a grievance or invoking *Weingarten* rights, motive is not a consideration because the conduct on its face would be a violation of Section 10(a)(1). In such cases, the Board has applied an objective test to evaluate whether the conduct violates Section 10(a)(1). But the Board in *Chicago Housing Authority (Kirk)*[140] and *County of Jersey*,[141] recognizing the inadequacy of the objective test in evaluating an employer's retaliatory conduct, considered the employer's motive for its actions. To determine if the employer acted with an improper motive, the Board applied the burden-shifting analysis used in Section 10(a)(2)-type cases, substituting the narrower anti-union support motive for a broader "anti-" concerted activity motive. If an employee can demonstrate the employer took action against them because they engaged in concerted activity, Section 10(a)(1) may provide protection from adverse employment actions without having to show the employer's "anti-union" animus.

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[1] 5 ILCS 315/1 *et seq*. (West 2018).

[22] *See* 5 ILCS 315/10(a) (West 2018).

[3] 5 ILCS 315/10(a)(1) (West 2018).

[4] *See State of Ill., Dep't of Central Mgmt. Servs. (Serio),* 2 PERI 2032 (ISLRB 1986) (finding that evidence of employer's intent to affect employees' exercise of rights under the Act was not required); *Chicago Housing Authority (Kirk),* 6 PERI ¶ 3013 (ILLRB 1990).

[5] Pub. Act 91-798 (eff. Jul. 9, 2000) dissolved both the State Labor Relations Board (State Board) and the Local Labor Relations Board (Local Board), creating in their places the State Panel and Local Panel of the Illinois Labor Relations Board. For decisions pre-dating the dissolution of the State and Local Boards, this article will specify the board that issued the decision in the text.

[6] S*ee, e.g., Township of Worth,* 3 PERI ¶ 2019 (ISLRB 1987) (finding that interrogation of employee about union activities and threats of retaliation against Township employees for union activity interfered with employee rights under the Act in violation Section 10(a)(1)); *see also Chicago Housing Authority (Gale),* 1 PERI 3010 (ILLRB 1985) (concluding that employer's retaliation against employee for filing grievances deters protected activity in violation of Section 10(a)(1)).

[7] 5 ILCS 315/10(a)(2); *see City of Burbank v. ISLRB*, 128 Ill.2d 335, 345-47, 538 N.E.2d 1146, 1149-50 (1989); *see also Pace Suburban Bus Div. of Reg'l Transp. Auth. v. ILRB,* 406 Ill. App. 3d 484, 493-95, 942 N.E.2d 652, 660-61 (1st Dist. 2010) (citing *City of Chicago (Mulligan),* 11 PERI ¶ 3008 (ILLRB 1995)

(requiring showing employer discriminated against employee based on union membership or union support)).

[8] *See Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990).

[9] 128 Ill.2d 335, 538 N.E.2d 1146 (1989).

[10] *Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990); *County of Jersey*, 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom. County of Jersey v. ISLRB*, No. 4-91-0462, 8 PERI ¶ 4015, 1992 WL 12647448 (4th Dist. 1992).

[11] The analysis for Section 10(a)(1) retaliation cases considers alleged conduct as a direct violation of that section rather than as a derivative violation of another part of Section 10(a) of the Act. *See, e.g., County of Peoria*, 3 PERI ¶ 2028 (ISLRB 1987) (finding employer's retaliatory conduct violated Section 10(a)(2) and derivatively, Section 10(a)(1) of the Act); *cf. Chicago Housing Authority (Gale)*, 1 PERI ¶ 3010 (ILLRB 1985) (noting that conduct violating the narrower protections of Section 8(a)(3) of the NLRA may establish a derivative violation of the broader Section 8(a)(1)).

[12] 1 PERI ¶ 2019 (ISLRB 1985).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* (citing *Youngstown Osteopathic Hosp. Ass'n*, 224 NLRB 574 (1976); *Wisc. Dep't of Emp't Relations v. Wisc. Emp't Relations Comm'n*, 122 Wis.2d 132, 361 N.W.2d 660 (1985); *Muskego-Norway C.S.J.S.D. No. 9 v. Wisc. Emp't Relations Bd.*, 35 Wis. 2d 540, 151 N.W.2d 617 (1967)).

[17] *Id.*

[18] 251 NLRB 1083 (1980); the Supreme Court approved the *Wright* Line approach in *NLRB v. Transportation Management. Corp.*, 462 U.S. 393 (1983).

[19] *See Village of Glendale Heights*, 1 PERI ¶ 2019 (ISLRB 1985).

[20] *See id.*

[21] *Id.*

[22] *Id.* (Board decision, n.1).

[23] 1 PERI ¶ 2020 (ISLRB 1985).

[24] *Id.*

[25] *Id.*

[26] The United States Supreme Court in *N.L.R.B. v. Weingarten*, 420 U.S. 251 (1975) and *N.L.R.B. v. Quality Mfg. Co.*, 420 U.S. 276 (1975) recognized an employee's right under the National Labor Relations Act to refuse to submit to an employer's investigatory interview without the presence of a union representative.

[27] *Ill. Dep't. of Central Mgmt. Servs. (Gerald Morgan)*, 1 PERI ¶ 2020 (ISLRB 1985).

[28] *Id.* (emphasis in the original). Although the decision cites Section 10(a)(2), this appears to be inadvertent, as the State Board noted it was approving the Hearing Officer's conclusion that the conduct violated Section 10(a)(1) of the Act. *See id.*

[29] 1 PERI ¶ 2019 (ISLRB 1985).

[30] *Ill. Dep't. of Central Mgmt. Servs. (Gerald Morgan),* 1 PERI ¶ 2020 (ISLRB 1985).

[31] *Id.*

[32] *See, e.g., Town of Decatur*, 4 PERI ¶ 2003 (ISLRB 1987) (applying *CMS/Morgan* analysis where union activist discharged for disagreements with supervisors, Board found violation of the Act); *see also Twp. of Worth,* 3 PERI ¶ 2019 (ISLRB 2019) (finding employer rebutted presumption of the standard make-whole remedy where); *County of Peoria,* 2 PERI ¶ 2028 (ISLRB 1987) (citing *CMS/Morgan* analysis and finding no illegal motive for discharging employees who violated employer patient care directive and dismissing charge); *and Rockford Twp. Hwy. Dep't.,* 2 PERI ¶ 2013 (ISLRB 1986) (discrediting employer's budget reduction reasons for discharging employees and ordering standard make-whole remedy).

[33] 3 PERI ¶ 2028 (1987).

[34] *Id.* (citing *Health Care Logistics, Inc.*, 273 NLRB 822 (1984) and *North Warren Reg'l Bd.*, 4 NJPER ¶ 4187 (N.J. 1978)).

[35] 1 PERI ¶ 3010 (ILLRB 1985).

[36] 29 U.S.C. § 158(a)(1),(3).

[37] *Chicago Housing Authority (Gale),* 1 PERI ¶ 3010 (ILLRB 1985). *See also City of Chicago (Green and Warns),* 3 PERI ¶ 3011 (ILLRB 1987) (observing Section 10(a)(2) violations ordinarily require evidence of motive whereas proof of motive is not necessarily required under Section 10(a)(1)).

[38] *Chicago Housing Authority (Gale),* 1 PERI ¶ 3010 (ILLRB 1985). *See also City of Chicago (Green and Warns),* 3 PERI ¶ 3011 (ILLRB 1987) (citing *Chicago Housing Authority (Gale)*).

[39] *Chicago Housing Authority (Gale),* 1 PERI ¶ 3010 (ILLRB 1985).

[40] 124 NLRB 146 (1959).

[41] 618 F.2d 288 (5th Cir. 1980).

[42] *Chicago Housing Authority (Gale),* 1 PERI ¶ 3010 (ILLRB 1985).

[43] *Id.*

[44] *Id.* The Local Board also upheld the hearing officer's conclusion that CHA's actions regarding Gale's promotion and discharge did not violate either Section 10(a)(1) or Section 10(a)(2) of the Act.

[45] 3 PERI ¶ 3028 (ILLRB 1986).

[46] *Id.*

[47] *Id.*

[48] 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[49] 3 PERI ¶ 2058 (ISLRB 1987), *aff'd in part, rev'd in part and remanded sub nom. County of Menard v. ISLRB*, 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[50] See *County of Menard (I)*, 3 PERI ¶ 2043 (ISLRB 1987) and *County of Menard (III)*, 6 PERI ¶ 2006 (ISLRB 1989), *aff'd sub nom. County of Menard v. ISLRB, No.* No. 4-90-0024, 7 PERI ¶ 4005, 1990 WL 10610752 (4th Dist. 1990).

[51] *County of Menard (I)*, 3 PERI ¶ 2043 (ISLRB 1987).

[52] *Id.*

[53] *Id.*

[54] *County of Menard (II)*, 3 PERI ¶ 2058 (ISLRB 1987), *aff'd in part, rev'd in part sub nom. County of Menard v. ISLRB*, 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[55] 1 PERI ¶ 2020 (ISLRB 1985).

[56] *County of Menard (II)*, 3 PERI ¶ 2058 (ISLRB 1987), *aff'd in part, rev'd in part sub nom. County of Menard v. ISLRB* 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[57] *County of Menard (II)*, 3 PERI ¶ 2058 (ISLRB 1987), *aff'd in part, rev'd in part and remanded sub nom. County of Menard v. Ill. State Labor Relations Bd.*, 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[58] *County of Menard v. Ill. State Labor Relations Bd.*, 177 Ill. App. 3d 139, 143-44, 531 N.E.2d 1080, 1083 (4th Dist. 1988).

[59] *County of Menard v. Ill. State Labor Relations Bd.*, 177 Ill. App. 3d 139, 531 N.E.2d 1080 (4th Dist. 1988).

[60] *Id.* at 152, 531 N.E.2d at 1089.

[61] See discussion *supra* notes 23–28 and accompanying text.

[62] 174 Ill. App. 3d 168, 528 N.E.2d 737 (4th Dist. 1988).

[63] *See County of Menard v. ISLRB*, 177 Ill. App. 3d 139, 149-52, 531 N.E.2d 1080, 1086-88 (4th Dist. 1988).

[64] 152 Ill. App. 3d 863, 506 N.E.2d 390 (2d Dist. 1987).

[65] 174 Ill. App. 3d 168, 528 N.E.2d 737 (4th Dist. 1988).

[66] *See County of Menard v. ISLRB*, 177 Ill. App. 3d 139, 151-52, 531 N.E.2d 1080, 1088 (4th Dist. 1988).

[67] Illinois Educational Labor Relations Act, 115 ILCS 5/14(a)(3) (West 2018).

[68] *See County of Menard v. ISLRB*, 177 Ill. App. 3d 139, 152, 531 N.E.2d 1080, 1088-89 (4th Dist. 1988).

[69] *See id.*

[70] *See id.*

[71] 6 PERI ¶ 2006 (ISLRB 1989), *aff'd sub nom. County of Menard v. ISLRB, No.* No. 4-90-0024, 7 PERI ¶ 4005, 1990 WL 10610752 (4th Dist. 1990).

[72] 6 PERI ¶ 2006 (ISLRB 1989), *aff'd sub nom. County of Menard v. Ill. State Labor Relations Bd., No.* No. 4-90-0024, 7 PERI ¶ 4005, 1990 WL 10610752 (4th Dist. 1990).

[73] *City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989).

[74] *See id.* at 345-47, 538 N.E.2d at 1149-51.

[75] *City of Burbank (Burbank II)*, 2 PERI ¶ 2034 (ISLRB 1986).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id. See also City of Burbank (Burbank I)*, 1 PERI ¶ 2008 (ISLRB 1985) (representation case).

[80] *City of Burbank (Burbank II)*, 2 PERI ¶ 2034 (ISLRB 1986). *See also City of Burbank (Burbank I)*, 1 PERI ¶ 2008 (ISLRB 1985) (representation case).

[81] *See id.*

[82] *Id.*

[83] *Id.*

[84] *City of Burbank v. ISLRB*, 168 Ill. App. 3d 885, 523 N.E.2d 68 (1st Dist. 1988).

[85] *Id.* at 893-95, 523 N.E.2d at 73-74.

[86] *Id.* at 894-95, 531 N.E.2d at 73-74.

[87] 128 Ill.2d 335, 538 N.E.2d 1146 (1989).

[88] *See id.* at 345-48, 538 N.E.2d at 1149-51.

[89] *Id.* at 345, 538 N.E.2d at 1149-50.

[90] *Id.* at 345-46, 538 N.E.2d at 1150.

[91] *See City of Burbank*, 128 Ill.2d at 345-46, 538 N.E.2d at 1150 (citing *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985)).

[92] *See City of Burbank*, 128 Ill.2d at 345-46, 538 N.E.2d at 1150 (citing *NLRB v. E.I. DuPont De Nemours*, 750 F.2d 524, 529 (6th Cir. 1984)).

[93] *See City of Burbank*, 128 Ill.2d at 345-46, 538 N.E.2d at 1150 (citing *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 905 (3rd Cir. 1981) and *NLRB v. Supreme Bumpers, Inc.*, 648 F.2d 1076, 1077 (6th Cir. 1981)).

[94] *Id.* at 345-46, 538 N.E.2d at 1150 (citing *Turnbull Cone Baking Co.*, 778 F.2d at 297; *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1268 (7th Cir. 1987); and *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 626 (7th Cir. 1981)).

[95] *See id.* at 346-47, 538 N.E.2d 1150 (1989) (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400-03 (1983) and *Roscello v. Southwest Airlines, Co.*, 726 F.2d 217, 222-23 (5th Cir. 1984)).

[96] *Id.* at 347-48, 538 N.E.2d at 1150-51.

[97] *See id.* (citing *Roscello*, 726 F.2d at 222).

[98] *Id.* at 347-48, 538 N.E.2d at 1150-51 (citing *Turnbull Cone Baking Co.*, 778 F.2d at 297).

[99] *Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990); *County of Jersey*, 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom. County of Jersey v. ISLRB*, 8 PERI ¶ 4015 (4th Dist. 1992).

[100] *See Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990); *County of Jersey*, 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom. County of Jersey v. ISLRB*, 8 PERI ¶ 4015 (4th Dist. 1992).

[101] 6 PERI ¶ 3013 (ILLRB 1990).

[102] *Id.*

[103] *Id.*

[104] *Id.* (citing *City of Chicago (Green and Warns)*, 3 PERI ¶ 3011 (ILLRB 1987) and *City of Chicago (Gale)*, 1 PERI ¶ 3010 (ILLRB 1985)).

[105] *Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990).

[106] *Id.*

[107] *Id. (emphasis in the original).*

[108] *City of Chicago (Green and Warns)*, 3 PERI ¶ 3011 (ILLRB 1987); *City of Chicago (Gale)*, 1 PERI ¶ 3010 (ILLRB 1985).

[109] *Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990) (emphasis in the original).

[110] *Id.* (citing *Potential School for Exceptional Children*, 282 NLRB 1087 (1987), *enf'd*, 883 F.2d 560 (7th Cir. 1989).

[111] *Chicago Housing Authority (Kirk)*, 6 PERI ¶ 3013 (ILLRB 1990).

[112] 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom., County of Jersey v. ISLRB*, No. 4-91-0462, 8 PERI ¶ 4015, 1992 WL 12647448 (4th Dist. 1992).

[113] *Id.*

[114] *Id.*

[115] *Id.*, (citing *State of Ill., Dep't of Central Mgmt. Servs. (Serio)*, 2 PERI 2032 (ISLRB 1986) (grievance filing is protected concerted activity)).

[116] 6 PERI ¶ 3013 (ILLRB 1990).

[117] *County of Jersey (Lewis and McAdams),* 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom., County of Jersey v. ISLRB,* No. 4-91-0462, 8 PERI ¶ 4015, 1992 WL 12647448 (4th Dist. 1992).

[118] *Id.*

[119] *County of Peoria,* 3 PERI ¶ 2028 (ISLRB 1987).

[120] *County of Jersey (Lewis and McAdams),* 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom., County of Jersey v. ISLRB,* No. 4-91-0462, 8 PERI ¶ 4015, 1992 WL 12647448 (4th Dist. 1992).

[121] *Id.*

[122] *Id.*

[123] 406 Ill. App. 3d 484, 942 N.E.2d 652 (1st Dist. 2010).

[124] *PACE Northwest Division (Panikowski),* 25 PERI ¶ 188 (ILRB Local Panel 2009), *aff'd sub nom. Pace Suburban Bus Div. of the Reg'l Transp. Auth. v. ILRB, Local Panel,* 496 Ill. App. 3d 484, 942 N.E.2d 652 (1st Dist. 2010).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Pace Suburban Bus Div. of the Reg'l Transp. Auth. v. Ill. Labor Relations Bd., Local Panel,* 496 Ill. App. 3d 484, 942 N.E.2d 652 (1st Dist. 2010). Pace also contended (1) the Board's findings were erroneously based solely on Pace's shifting reasons for discharge; (2) the Board refused to consider Pace's legitimate reasons for its actions; and (3) the Board improperly relied on conduct occurring outside the Act's six-month limitation period. *Id.*

[130] *Id.* at 493-96, 942 N.E.2d at 660-63.

[131] *Id.* at 494, 942 N.E.2d at 661.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 494-95, 942 N.E.2d at 661.

[135] *Id.* at 495, 942 N.E.2d at 661-62 (citing *City of Burbank,* 128 Ill.2d at 345, 531 N.E.2d at 1146).

[136] 302 Ill. App. 3d 411, 415, 705 N.E.2d 924, 927 (5th Dist. 1999).

[137] 392 Ill. App. 3d 628, 636, 911 N.E.2d 425, 432-33(1st Dist. 2009), *rev'd on other grounds, Speed Dist. 802 v. Warning,* 242 Ill.2d 92, 950 N.E.2d 1069 (2011).

[138] *Pace Suburban Bus Div.*, 496 Ill. App. 3d at 495-96, 942 N.E.2d at 662 (citing *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836 (1984); *Roadmaster Corp. v. NLRB*, 874 F.2d 448, 452 (7th Cir. 1989); *NLRB v. Ryder/P.I.E. Nationwide, Inc.*, 810 F.2d 502, 507 n.3 (5th Cir. 1987)).

[139] *Id.* at 496, 942 N.E.2d at 663 (1st Dist. 2010).

[140] *Chicago Housing Authority (Kirk),* 6 PERI ¶ 3013 (ILLRB 1990).

[141] *County of Jersey (Lewis and McAdams),* 7 PERI ¶ 2023 (ISLRB 1991), *aff'd sub nom., County of Jersey v. ISLRB,* No. 4-91-0462, 8 PERI ¶ 4015, 1992 WL 12647448 (4th Dist. 1992).

RECENT DEVELOPMENTS

By Student Editorial Board:

Patrick J. Foote, Mayra Gomez, Michael P. Halpin, Matt Soaper

I. IELRA Developments

A. Duty of Fair Representation

In *Bowles v. Elmhurst Teachers Council, West Suburban Teachers Union, IFT-AFT*, 36 PERI ¶ 58 (IELRB 2019), the IELRB upheld its Executive Director's dismissal of an unfair labor practice charge which alleged that the union breached its duty of fair representation when it failed to file a grievance of unfair labor practice charge challenging the charging party's receipt of a letter of notice in her personnel file.

On December 3, 2018, Michele C. Bowles, a teacher, filed an unfair labor practice charge with the IELRB alleging that Elmhurst Teachers Council, West Suburban Teachers Union, Local 571, IFT-AFT committed unfair labor practices when it failed to represent her during meetings with Elmhurst Community Unit School District 205 that resulted in a letter or notice in her personnel file. Sometime after filing her initial charge, Bowles ran for union president and submitted additional evidence to the IELRB not available during the initial investigation. Bowles maintained that statements made by the incumbent president on his campaign website and in emails to union members criticizing Bowles for filing the charge indicated that the incumbent was a significant reason why the union decided to not file a grievance on her behalf. Bowles also submitted the incumbent's answers to union members' questions in which he criticized Bowles for her conduct when she served as union vice-president.

The Executive Director reasoned that the union's conduct in the context of a union election is an internal union matter over which the "IELRB ha[d] no jurisdiction unless there was an impact on or nexus to a charging party's employment conditions." Since there was no such nexus in this case, the IELRB had no jurisdiction. Furthermore, even if the IELRB had jurisdiction, there was no correlation between the former union president's comments and the union's decision to not act on behalf of Bowles.

Bowles filed exceptions claiming that (1) the union refused her requests to meet with her in violation of its duty of fair representation and that (2) the union's failure to provide evidence that it met and discussed the appeal of

the District's decision regarding the letter of notice in her file established that it breached its duty of fair representation.

The IELRB concluded that the record did not support the contention that the union refused to meet with Bowles because the union submitted emails from the incumbent to Bowles in which he invited her to meet with him to discuss concerns regarding her disciplinary action. Additionally, the IELRB concluded that the absence of evidence that the union met and discussed Bowles' appeal did not establish a breach of its duty of fair representation. The IELRB reasoned that a union has wide discretion in in representing the bargaining unit and there is no requirement that discretion be exercised by a group of officials rather than just one or two. The Board affirmed the Executive Director's dismissal of the unfair labor practice charge.

B. Unfair Labor Practice Charge Timeliness

In *Chicago Teachers Union, Local 1, IFT-AFT and Chicago Board of Education,* 36 PERI ¶ 43 (IELRB 2019), the IELRB held that an unfair labor practice charge filed by the Chicago Teacher's Union against the Chicago Board of Education more than six months after the alleged unfair labor practice was untimely. Consequently, the charge alleging that the Chicago Board of Education violated Sections 14(a)(3) and derivatively (1) of the IELRA was dismissed in its entirety.

During the spring of 2017, two probationary teachers, Witwoski and Miglietta, were involved in organizing and circulating a letter to the Uplift Local School Council (LSC) and office of CBE Network 2 that expressed a lack of confidence in the school principal. In December 2017, Miglietta was involved in organizing a meeting at the Chicago Grassroots Curriculum Taskforce to discuss concerns about poor administrative leadership and its negative impact on students, teachers, and the school. The principal issued pre-disciplinary notices in January 2018. The notices accused Witowski of being tardy and Miglietta of not complying with Uplift's lesson plan.

The principal then issued a second pre-disciplinary notice to Miglietta accusing him of verbally humiliating a new staff member. On June 1, 2018 the two received correspondence indicating their appointments would not be renewed. They received "unsatisfactory" summative evaluation ratings on September 21, 2018. The Chicago Teachers' Union filed the unfair labor practice charge on March 1, 2019.

The IELRB held that the six-month charge-filing period began to run when Witowski and Miglietta received the letters on June 1, 2019, notifying them that their appointments were not being renewed. The IELRB additionally found Witowski and Miglietta's receipt of lowered summative evaluations on September 21, 2018 was inconsequential because they should have known of the Chicago Board of Education's alleged retaliatory conduct from the June 1 letters. Because the charge was filed more than six months after June 1, 2018, the IELRB dismissed it as untimely.

II. IPLRA Developments

A. Duty to Bargain

In *Policemen's Benevolent Labor Committee, and County of Cook and Sheriff of Cook County*, 36 PERI ¶ 54 (ILRB Local Panel 2019), the ILRB Local Panel overruled its ALJ and held that the union waived its right to bargain over the effects of the Sheriff's decision to lay off 18 lieutenants.

In 2017, the union and Cook County Sheriff's office were approaching the expiration date of their current collective bargaining agreement. They had agreed to extend the terms of the previous contract until they reached a new agreement. In November of that year, the Sherriff's office informed the union that of the need to lay off 18 lieutenants. The Sherriff's office and union met multiple times over the next few months to bargain over the effects of the layoff and to find a solution to avoid the layoffs. During these meetings, the Sherriff's office agreed to delay the layoffs by about a month and extend the recall rights of the lieutenants.

The ALJ found that, while the Sherriff's office had no obligation to bargain over the decision, it still violated Section 10(a)(4) and 10(a)(1) because it did not bargain in good faith over the effects. The ALJ found that the layoff decision was implemented before impasse was reached in effects bargaining, as the final effects bargaining session occurred a few days after implementation. The Local Panel rejected the ALJ's findings. The ILRB observed that the union sought to bargain over the effective date of the layoffs, the lieutenants' compensatory time and seniority after the layoffs and the assignment and reassignment of lieutenants not laid off. The ILRB stated that the layoff date is an "an inevitable consequence of the layoff decision itself." Therefore, the Sherriff's office did not have to bargain over this issue and could proceed with the layoffs on the date of its choosing. The Local Panel further found that compensatory time and seniority were covered by the existing collective bargaining agreement and, therefore,

there was no duty to bargain further over these issues. As for assignment and reassignment, the ILRB found that the contract gave the Sheriff the right to make work assignments and determine the number of personnel needed to carry out the office's duties. The ILRB held that the union clearly and unequivocally waived its right to bargain over this issue.

In *North Riverside Fire Fighters, Local 2714 and Village of North Riverside*, 36 PERI ¶56 (ILRB State Panel 2019), the State Panel held that the Village violated Section 10(a)(4) by failing to maintain the status quo while interest arbitration proceedings were pending.

On March 14, 2018, North Riverside Fire Fighters Local 2714 filed an unfair labor practice charge against the Village of North Riverside alleging that the Village violated Sections 10(a)(4) and (1) of the Act when it changed the health insurance of newly-hired firefighters during the pendency of impasse resolution proceedings. The Village argued that the health insurance that it provided to newly hired firefighters was "substantially equal, as the contract required."

The instant charges arose out of a longstanding contract battle. The parties' collective bargaining agreement expired in 2014. After months of negotiation, the parties requested mediation with the Federal Mediation and Conciliation Service. After that failed, the union filed for interest arbitration. The union then filed charges alleging that the Village engaged in "surface bargaining over a proposal to privatize its fire department." When the Village sent the union a letter "purporting to terminate the collective bargaining agreement and the employment of all firefighters," the union filed an unfair labor practice charge. It was determined that the Village had violated the IPLRA. The parties were still working under the expired collective bargaining agreement.

The administrative law judge found, and the State Panel agreed, that the change to the health insurance for new employees constituted a failure to maintain the status quo during the pendency of interest arbitration hearings and was a violation of the Act. "The test for determining whether a practice is sufficiently established to constitute the status quo requires a determination of four factors, (1) the parties' past history, (2) their past bargaining practices, (3) the terms of the existing collective bargaining

agreement, and (4) the reasonable expectations of employees." The language of the parties' collective bargaining agreement allowed the Respondent to change health insurance plans as long as the benefits were "substantially equal." The ALJ determined, among other things, that the new plan "significantly increase[d] employees' up-front costs." What's more, the Respondent's agents had implicitly acknowledged that the there was "a significant disparity" between the plans and that conduct "fostered employees' reasonable expectations that [the new plans] were not substantially equal to [the old] plan and that the Respondent therefore would not unilaterally substitute" one for the other.